Published on *The National Law Review* https://natlawreview.com

Insignificant Harm Not So Insignificant in Proving Title VII Transfer Violation - SCOTUS Today

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A unanimous Supreme Court has eased the route for a plaintiff to prove a violation of Title VII of the Civil Rights Act of 1964 in *Muldrow v. City of St. Louis*.

Sergeant Jatonya Muldrow brought suit against the St. Louis Police Department when she was transferred from the department's Intelligence Division to a uniformed role in one of the department's police districts. Notwithstanding the fact that Sergeant Muldrow (whom her former supervisor addressed as "Ms." rather than "Sergeant") was a most dependable "workhorse" on the job, the supervisor determined that Muldrow's position was somehow too dangerous for a woman, and so, against her protest, Muldrow was reassigned. Where she had been working with high-ranking officials on high-priority police matters, Muldrow now supervised the day-to-day activities of neighborhood patrol officers. However, while her responsibilities, perks, and schedules were now different, including having lost a deputized role with the FBI and the car that came with it, Sergeant Muldrow's rank and pay remained the same.

Muldrow brought a Title VII suit against the department, which she claimed had "discriminate[d] against" her based on sex "with respect to" the "terms [or] conditions" of her employment. 42 U. S. C. §2000e–2(a)(1).

The lower courts rejected the claim on the ground that the transfer did not cause Muldrow a "significant" employment disadvantage. That holding reflected a split in the circuits concerning the standards used in addressing Title VII suits arising from job transfers. Reversing the holding of the U.S. Court of Appeals for the Eighth Circuit, the Supreme Court flatly and unanimously rejected that high standard. Writing for six Justices, Justice Kagan announced that, although an employee must show *some* harm from a forced transfer to prevail in a Title VII suit, she need not show that the injury satisfies a significance test. "Title VII's text nowhere establishes that high bar. Muldrow need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so." In separate concurring opinions, Justices Thomas, Alito, and Kavanaugh agreed with Justice Kagan as to the outcome but suggested that the Court had done nothing new or exceptional and that cases, including this one, merely should involve evidentiary considerations that were being applied in all of the courts of appeals. The grant of certiorari itself casts doubt on that assertion, but given the Court's clear holding, it hardly matters.

That should prove to be the case when the U.S. District Court for the Eastern District of Missouri, on remand, addresses the evidentiary questions that the Supreme Court did not resolve. As for the *Muldrow* case itself, nothing could be clearer. The entire Supreme Court has held that "'[d]iscriminate against' means treat worse, here based on sex.'" Employers and those of us who represent them must be prepared to act and defend on this basis.

A unanimous Court, per Justice Sotomayor, held in *McIntosh v. United States* that the U.S. District Court for the Southern District of New York's failure to comply with Fed. R. Crim. P. 32.2(b)(2)(B)'s requirement to enter a preliminary order before sentencing does not bar the court from ordering forfeiture at sentencing subject to harmless-error principles. Notwithstanding its failure to have entered such an order at a preliminary sentencing hearing, the district court retained its power to order forfeiture. Reciting well-established precedent, the Court noted that it has identified three types of time limits: (i) jurisdictional deadlines, (ii) mandatory claim-processing rules, and (iii) time-related directives. *See Dolan v. United States*, 560 U. S. 605, 610–611 (2010).

Here, the Court concluded that that deadline was a time-related directive that, if missed, does not deprive the official of "the power to take the action to which the deadline applies." Id., at 611. As noted, noncompliance with a time-related directive is subject to harmless-error principles on appellate review, *See* Fed. Rule Crim. Proc. 52(a).

Yet another peaceful day among the Justices. However, as the U.S. Weather Service notes, hurricane season begins on June 1. Given several recent oral arguments and several to come, one can foresee darkening and turbulent skies ahead over One First Street, NE, in Washington, DC, as the current term of court proceeds.

National Law Review, Volume XIV, Number 108